DOCUMENT RESUME

ED 243 153 CS 208 311

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TITLE The Legitimacy of Punitive Damages in Media Libel Cases.
PUB DATE Aug 84
NOTE 21p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (67th, Gainesville, FL, August 5-8, 1984).
PUB TYPE Reports - Research/Technical (143) -- Information Analyses (070) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Censorship; *Freedom of Speech; Legal Costs; *Legal Responsibility; *Media Research; *News Media; News Reporting; Press Opinion; Punishment
IDENTIFIERS *Libel; *Punitive Damages; Self Censorship

ABSTRACT

The constitutionality of punitive damage awards in media defamation litigation was examined through a review of federal and state libel case law since the 1964 Supreme Court decision in "New York Times v. Sullivan." Using the opinions of various courts and justices and studies of libel litigation, a number of areas bearing on the issue were explored, including (1) the unpredictability of punitive awards, both in size and the lack of standards used by juries in determining them; (2) the effect this unpredictability, along with high damage awards, has on media self-censorship; and (3) the effect of the high cost of defending against libel litigation through the entire appeals process has had on self-censorship. In addition, the state's basic interest in libel litigation--to compensate for damage to reputation--was examined to determine if punitive damages met or exceeded the requirements of that interest. The major findings of the examination were that punitive damage awards in media libel cases definitely have resulted in fostering an atmosphere of self-censorship. In addition, the increasing frequency of libel litigation that must be pursued through the appellate courts has added prohibitively high legal defence costs to the threat of punitive damages. Finally, the examination revealed that punitive damage awards may go beyond the basic interest of the state in libel litigation and may be interfering with editorial freedom rather than vindicating damaged reputations. (FL)

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THE LEGITIMACY OF PUNITIVE DAMAGES IN MEDIA LIBEL CASES

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THE LEGITIMACY OF PUNITIVE DAMAGES IN MEDIA LIBEL CASES

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The constitutionality of punitive damage awards in media defamation litigation provides the focus of this paper. The study of this subject involved the examination of libel case-law since New York Times v. Sullivan both in federal and state court systems.

Several areas bearing on the constitutionality of punitive damage awards were examined based on the opinions of various courts and justices and on studies on libel litigation. This paper examined the unpredictability of punitive awards, both in their size and the lack of standards used by juries in determining their award. The recent trend by juries to award excessively high damage awards against the media combined with the unpredictability of these awards was examined to determine if these trends had a chilling effect leading to self-censorship by the media. The high cost of defending against libel litigation through the entire appeal process was examined to see what effect legal costs and libel insurance had on the self-censorship of the media. The basic state's interest in libel litigation, that being to compensate for damage to reputation, was examined to determine if punitive damages met or exceeded the requirements of this basic state interest.

The principal findings of this paper were that punitive damage awards in media libel cases definitely have resulted in fostering an atmosphere of self-censorship. The press cannot participate in a full and open discussion of public affairs as set forth in the First Amendment when they face the specter of unpredictable and potentially huge punitive damage awards. In addition, the increasing frequency of libel litigation that must be pursued through the appellate courts to overcome the effects of passionate juries and the errors of trial courts has added prohibitively high legal defense costs to the specter of punitive damage awards. This paper has also found that punitive damage awards may go beyond the basic interest of the state in libel litigation and may be interfering with editorial freedom rather than vindicating damage awards may go beyond the basic interest of the state in libel litigation and may be interfering with editorial freedom rather than vindicating damaged reputations. The vindication of a defamed person's reputation does not require a huge damage award that exceeds the amount of actual damage suffered.

INTRODUCTION

Two decades ago the American media enthusiastically embraced the ideal of "uninhibited, robust and wide-open"[1] discussion of public officials and issues of public importance set forth in the United States Supreme Court New York Times, Co. v. Sullivan decision as a triumph for freedom of expression. However, it is becoming increasingly more evident that this ideal is not going to reach fruition so long as the media, charged with providing the forum for this open and robust discussion, must face the threat of huge and unpredictable punitive damage awards and concomittant expensive litigation in libel cases. Recently there has been an upsurge in the dollar amount of damage awards awarded by juries in libel cases. According to the Libel Resource Defense Center the average award in recent libel actions is over $2 million, with malpractice awards averaging under $700,000 and product liability awards averaging slightly over $750,000 for the same period.[2] Although Times was expected to deter a significant number of libel suits and thus help protect the media from extreme pecuniary risk, including litigation costs, the "chilling effect" of the ever-increasing threat of this pecuniary risk is promoting self-censorship within the media. This self-censorship is in contravention to the state's basic interest underlying the law of libel, that being to compensate the defamed party for damages suffered. The state's basic interest is not to stifle the voice of the press. Self-censorship as a result of the threat of defamation litigation is contrary to the very principle of free speech set forth in the First Amendment.[3]

It is in view of this controversy over the award of punitive damages that this paper will explore whether punitive damages are proper, legitimate and constitutional remedies for defamation by the media.

BACKGROUND

Punitive damages, also known as vindictive, exemplary and punitory damages, are not intended to compensate the plaintiff but to punish the defendant.[4] According to the Supreme Court, punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurence."[5] Thus, punitive damages can be interpreted as a type of criminal penalty imposed in a civil trial.[6] Punitive damages have been criticized as "undue compensation to the plaintiff beyond his just deserts in the form of a criminal fine which should be paid to the state if anyone."[7]

The common-law standard for the award of punitive damages was that it had to be proven that the defendant was guilty of malicious conduct toward the plaintiff. If this was proven by a mere predonderence of evidence, then the jury could award punitive damages. The common-law standard for malice is very different from the constitutional standard of "actual malice."

"Actual malice" has been defined by the Supreme Court as knowledge of falsity or reckless disregard for the truth.[8] The common-law standard focuses on the defendant's motivation toward the plaintiff, and the constitutional standard concentrates on the defendant's attitude toward the truth during the editorial process.

In Gertz v. Robert Welch the Supreme Court precluded the state and federal courts from submitting the issue of punitive damages to libel juries unless there was "clear and convincing evidence"[9] of the existence of constitutional actual malice. This constitutional bar to the award of punitive damages without evidence of actual malice applies to all libel plaintiffs including private citizens as well as public officials and public figures. The Court said:

> ...the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damage as are sufficient to compensate him for actual injury.[10]

In Gertz, the Supreme Court hoped to create an atmosphere that would promote open discussion of public affairs and issues. The Court had hoped to provide sufficient insulation from unnecessary or unfounded litigation against the media in order to stimulate open and robust debate of public issues. This rationale is stated most succinctly by Justice Blackmun in his concurrence:

> By removing the specters of presumed and punitive damages in the absence of New York Times malice, the Court eliminates significant and powerful motives for self-censorship that otherwise are present in the traditional libel action. By so doing, the Court leaves what should prove to be sufficient and adequate breathing space for a vigorous press.[11]

After Gertz the courts had little trouble in recognizing and applying the rule that all punitive damage awards in libel cases must be supported by affirmative evidence of actual malice to the level of convincing clarity.[12]

Although Gertz adequately defined the standard of malice required for the award of punitive damages, it did not totally eliminate the "chilling effect" of punitive awards in libel suits. The unpredictability of such liability and the amount of punitive damages can subject the media to close self-scrutiny of material before its publication. The apprehension of a large punitive damage award that may bankrupt the publisher could lead to a decision not to chance publication of controversial material. Not only has the trend been toward large awards by libel juries recently, but even the cost of defending against libel suits can be staggering. Also, due to the dramatic impact the punitive damages have on the media, recently the question has been raised of whether punitive damages can serve the fundamental interest of the states in defamation suits, by deterring legitimate freedom of expression.

DISCUSSION

The State's Interest in Punitive Awards

In general terms, the purpose of punitive or exemplary damages in defamation suits is to punish a defendant for evil behavior and to deter him from engaging in such conduct in the future.[13] Historically, punitive damages have been limited

to the most wrongful conduct. The Supreme Court has not denied that punitive damages are permissible in defamation suits.[14] However, up to this point the Court has stated that the interest served by punitive damages are of a secondary nature to the more important interest of protecting the defamed person's reputation, an interest generally served adequately by compensatory damages.

The first skepticism on the part of the Court concerning the legitimacy of punitive damage awards in libel cases was indicated by two justices in dissenting opinions in Rosenbloom v. Metromedia.[15] Justice Harlan, seriously questioned the constitutionality of punitive damages, stating:

> ...the legitimate function of libel law must be understood as that of compensating individuals for actual, measurable harm caused by the conduct of others. This can best be demonstrated by postulating a law that subjects publishers to jury verdicts for falsehoods that have done the plaintiff no harm. In my view, such a rule can only serve a purpose anti-thetical to those of the First Amendment. It penalizes speech, not to redress or avoid the infliction of harm, but only to deter the press from publishing material regarding private behavior that turns out to be false simply because of its falsity. This the First Amendment will not tolerate. Where the State cannot point to any tangible danger, even knowingly erroneous publication is entitled to constitutional protection because of the interest in avoiding an inquiry in the mere truth or falsity of speech.[16]

Justice Marshall stated that he would not permit punitive damages to be imposed, and only damages "related to some proved harm" should be allowed.[17] Justice Marshall also suggested that punitive damages could never be reconciled with requirements of the First Amendment.[18]

In Gertz, the Court reiterated that the "legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood."[19] In order for the state to serve that interest, the Court ruled that private plaintiffs could recover compensatory damages without a showing of actual malice. The Court also ruled that punitive damages could be imposed in cases involving private plaintiffs, but only where evidence of actual malice was clearly shown under the Times rule.[20]

Left undecided in Gertz was the question of whether public officials or public figures could ever recover punitive damages. The Second Circuit Court has suggested that Gertz may lead to an eventual constitutional bar to such awards.[21]

Six states have adopted the position that no punitive damages may be awarded to a libel plaintiff in any case: Louisiana,[22] Massachusetts,[23] Nebraska,[24] Washington,[25] New Hampshire,[26] and Oregon.[27] In rejecting the award of punitive damages altogether in defamation cases, the Massachusetts Supreme Court said:

> We reject the allowance of punitive damages in this Commonwealth in any defamation action, on any state of proof...We so hold in recognition that the possibility of excessive and unbridled jury verdict, grounded on punitive assessments, may impermissably chill the exercise of First Amendment rights by promoting apprehensive selfcensorship.[28]

West Virginia has ruled that in cases where substantial actual damages are awarded, punitive damages may not also be awarded because the combination "would have a chilling affect upon the legitimate exercise of First Amendment rights and would lead to the type of self-censorship which has been the object and purpose of the United States Supreme Court since New York Times..."[29]

Some authorities would argue that the state's interest in defamation actions goes beyond the compensation provided by compensatory damages and protects the reputation of the defamed by punishing the defendant[30] and thereby providing a deterrence[31] to future defamation actions by the defendant.

However, it is clear from Gertz that the Supreme Court views compensation for injury to reputation as the foremost state interest in defamation liability, and that free speech should not yield except where the compensation function is clearly not being served.

The Unpredictability of Punitive Awards

The basic concept for the constitutional justification of the Times actual malice rule is the idea that free and robust discussion of public issues as promoted by the First Amendment can be hampered by the threat of pecuniary liability.

Therefore, the Supreme Court found it necessary to prevent unlimited state power to impose such liability. However, the Times rule is but one side of the self-censorship problem. While Times addressed the threat of pecuniary liability, it did not address the size of that liability. The chilling effect of pecuniary liability on the exercise of First Amendment rights not only results from the extent of the risk, but also from the extent of liability that may be imposed.

It has long been recognized that the amount of punitive damages assessed in a defamation case is up to the discretion of the jury, subject of course to review by trial and appellate courts.[32] In review of punitive awards, a New Jersey appellate court acknowledged that "there is no established standard by which the amount of punitive damages may be fixed."[33] The standards by which the different states' appellate courts review punitive damage awards for excessiveness are all vague and provide little insight for defendants, or the courts for that matter, as to what is considered adequate and what is considered excessive. State courts affirm punitive damage awards unless for a variety of reasons they are deemed unreasonable. For example, unreasonable damages may "shock the sense of justice";[34] are "excessive"[35] or "disproportionate"[36] to actual damages; or "disproportionate to wealth of the defendant";[37] are the result of "passion and prejudice"[38] on the part of the jury; were "grossly excessive";[39] or the jury has departed from "reasonable bounds";[40] or unless the award can be properly reduced "with justice to the parties."[41] Some courts require that the punitive damage award bear some relation to the actual damages suffered;[42] while others reject the notion that there be any relationship at all between the amount of actual damages and the amount of punitive damages awarded.[43]

The result of all this confusion is that the defendant cannot form even a vague notion of what his ultimate liability for a punitive damage award might be, even in those cases where he can determine the possibility that such damages will be awarded.

Another great concern to the defendant is the potentially huge dollar amount of punitive damages as exemplified by recent jury verdicts:[44] $26.5 million to a former Miss Wyoming in a case against Penthouse magazine (overturned on appeal), $9.2 million against the Alton (Illinois) Telegraph for a memorandum sent to the Justice Department concerning a contractor's alleged organized crime connections settled out of court for over $1 million (the paper filed for bankruptcy to prevent execution of the judgement against its assets); Carol Burnett's case against the National Enquirer in which the jury awarded $1.3 million in punitive damages, which were reduced on remittitur to $750,000 (Burnett has asked for a new trial); $4.56 million to two police inspectors and a former district attorney in San Francisco accused of framing a murder suspect; Guccine v. Hustler Magazine, Inc. in which an award of $26 million in punitive damages was reduced to $2.85 million on remittur; $2.5 million in punitive damages without a finding of compensation, (no other damages sought) to a Texas optometrist for mistaken identity in a book published by Doubleday & Co., (award set aside by trial court but reversed and rendered by appellate court and currently on appeal to the Texas Supreme Court).

The threat of such huge awards and the resulting self-censorship is a concern that has been reflected in the decisions of the Supreme Court and some lower courts. In Rosenbloom v. Metromedia, Justice Marshall proposed an outright ban on punitive damages, stating:

> The unlimited discretion exercised by juries in awarding punitive...damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgements. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such free-wheeling discretion presents obvious and basic threats to society's interest in freedom of the press. The utility of the discretion in fostering society's interest is protecting individuals from defamation is at best vague and uncertain...the essence of the discretion is unpredictability and uncertainty.
>
> The threats to society's interest in freedom of the press that are involved in punitive...damages can largely be eliminated by restricting the awards of damages to proved, actual injuries. The jury's wide-ranging discretion will largely be eliminated since the award will be based on essentially objective, discernable factors. And the self-censorship that results from the uncertainty created by the discretion as well as the self-censorship resulting from the fear of large judgements themselves would be reduced. At the same time, society's interest in protecting individuals from defamation will still be fostered. The victims of defamation will be compensated for their real injuries...And, there will be a substantial although imprecise and imperfect admonition to avoid future defamation...[45]

These concerns were reiterated by the majority of the Supreme Court in Gertz in stating that a private plaintiff must demonstrate actual malice in order to recover punitive damages:

> In most jurisdictions, jury discretion over the amounts [of punitive damages] awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies the negligence standard for private defamation action. They are not compensation for injury.[46]

In this opinion of the Court, it can readily be seen that punitive damages not only pose a great threat of self-censorship because of their unpredictability, but that punitive damages are totally irrelevant to the state's fundamental interest of compensating victims of defamation. The chilling effect of huge awards has also been recognized by a number of lower courts.[47]

It can be argued that punitive damages are necessary to punish the defendant to deter him from future defamations, and that such awards should

bear some reasonable relations to the actual damages sustained by the plaintiff. A rule of this type would lead to varying results, depending on the financial condition of the defendant. A punitive award that bears some relation to actual damages in a given case might bankrupt a small rural daily newspaper, but hardly make a dent in the deep pockets of the New York Times. The result of this type of justice would be that only the small media, those outlets whose reporting provides a popular forum of opinion and expression, would fear punitive damage awards. Thus, the very publications that need the greatest protection, in order to promote and provide a forum for open and robust discussion, would be silenced.[48]

Most of the courts, in permitting the award of punitive damages, have done so on the basis that actual malice is required for the award of such damages. These courts have determined that the actual malice rule provides enough constitutional protection in defamation suits. Some courts have also said that anyone who publishes with such malice places himself "beyond the pale" of the First Amendment protection.[49] This course of reasoning does coincide with the thrust of the Supreme Court's opinion in Times. In Times, the Court made it clear that defamation was not protected for its worth, but rather to prevent the chilling effect on those who fear liability.[50] In the two decades since Times was decided, litigation has shown that the actual malice rule is not sufficient protection of free speech to prevent self-censorship when the specter of huge and unpredictable punitive damage awards looms. Times falls short in preventing the chilling effect in that it operates:

> ...only at the threshold of liability, it does not cure the self-censorship effect of punitive damages. Before speaking, the publisher must still consider the risk of unlimited recovery in the event the plaintiff satisfies the requirement of actual malice.[51]

The High Cost of Defense

An even larger specter that looms in the minds of publishers may well be the high cost of litigation in defending suits, even where the defendant is successful. The Supreme Court shares in this concern stating: "would-be critics of official conduct may be deterred for voicing their criticism...because of doubt of whether it can be proved in court [that the statements are true] or fear of the expense of having to do so."[52] The cost of defending a libel suit can be enormous. Several years ago it was estimated that the cost of defending a suit started at $20,000. According to United Press International a libel trial lasting seven weeks has cost the Philadelphia Inquirer nearly $200,000 and is still being appealed.[53] In one case a publication decided not to print material that was crucial to a story because of the threat of a defamation suit. The material was deleted not because the suit would have been lost but because the cost of successful defense would have bankrupt the publication.[54] One newspaper's lawyer reported that in 1980 his client spent $240,000 on legal fees. During that year, twelve libel suits were pending against his client.[55] Even if a summary judgement is rendered and the case does not go to trial it can cost the defendant an estimated $50,000 in legal fees.[56]

The expectation of Times was that the actual malice rule would curtail a significant number of libel suits and thereby provide some degree of protection for the media from a substantial amount of pecuniary risk, including legal fees. This has not been the case. In the aftermath of Times, according to one author, "libel litigation has not only survived, it appears to be thriving...the prospect of windfall payoff probably lures some plaintiffs into court."[57] One court has agreed stating: "Regardless of the merits or extent of actual injury, some plaintiffs may be willing to trigger expensive litigation when the jackpot of open-end recovery looms in the background."[58]

The problem of facing high litigation costs is further compounded by the fact that many defendants entitled to protection under the actual malice rule are denied that privilege at the trial level and must pursue litigation through the appellate levels to vindicate their rights. This greatly increases the expense of defending against libel suits. In a recent study of libel litigation by Stanford professor Marc Franklin, data showed that 138 cases appealed by defendants, these defendents were ultimately successful in 60 percent of the appeals.[59] Franklin found that more than half of the jury awards that were upheld at the trial level were reversed at the appellate level.[60] The study also noted that "half of the reversals after trial were also dismissals, indicating that the cases should never have reached the jury. This suggests errors in the judges' application of the Times-Gertz rules..."[61]

In studying punitive damage awards, Franklin found that nine out of ten plaintiffs suing media defendants were awarded punitive damages, but at the appellate level only two plaintiffs kept their awards.[62] A follow-up study completed the next year concluded that defendants are successful in 66 percent of the suits that go through the appellate stage, while the plaintiffs success rate was only 5 percent.[63] A significant finding of these studies is that the Times privilege is successful but frequently only properly applied after expensive trial and appellate actions. More importantly, is the fact that the virtual certainty of failure has not deterred plaintiffs from commencing costly and time-consuming libel suits.[64] A plaintiff can pursue litigation with little threat of suffering any pecuniary loss by engaging a lawyer on a contigency basis whereby if the plaintiff receives no award, the lawyer receives little or no compensation. Considerable problems and risks exist for the defendant who must pursue a case through the appellate process. One of which is the nemisis of a facing judicial review with judges making ad hoc judgements on actual malice from one case to another.[65] Also, the defendant's ultimate

relief on reversal of damages at the appeal level is tempered by the cost of defending the case. This was one of the concerns shared by the Court in Times as a factor contributing to self-censorship.[66]

One author has pointed out that punitive damages are difficult to insure against and that there are even more benefits to be gained from the elimination of punitive damage awards:

> Although the effect of presumed damages may not be major,... Gertz does eliminate punitive damages unless the plaintiff proves knowing or reckless falsity...The elimination of punitive damages should significantly reduce the number of large recoveries...that Gertz will increase seli-censorship because of the subjective effect on publishers of the increased number of libel actions filed and the greater judicial receptivity to libel action after Gertz.[67]

Currently, twenty states do not allow insurance against punitive damages, twenty-two states allow coverage, and eight are still undecided on the issue of coverage for punitive damages.[68] Libel insurance if available, is often very expensive. One newspaper with a daily circulation between 100,000 and 300,000 reportedly paid liability insurance premiums that cost about $3,000 yearly for $5 million coverage with a $20,000 per case deductible during the years 1976-1980.[69]

Contrary to its original intent, the Times rule of actual malice has not provided sufficient constitutional protection for the media against self-censorship. This is supported by the precedence of two decades of litigation in post-Times defamation suits. Additionally, the idea that a defendnat who publishes a defamation with actual malice is considered beyond the protection of the First Amendment is irrelevant to the concerns of Times. Media libels are not protected for their intrinsic worth but in order to avoid inhibition of free expression on public issues. The Supreme Court stated this in Gertz:

> ...punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press...The First Amendment requires that we protect some falsehood in order to protect speech that matters."[70]

It is doubtful whether the state's interest in punishment and deterrence through punitive damage awards is sufficient enough to warrant such an infringement of constitutionally protected speech, and even if the state's interest is sufficiently important, cases have shown that the least restrictive means of vindicating those interests must be employed and the benefit gained must outweigh the loss of constitutionally protected rights.[71] If a state is to vindicate its interest in punishment and deterrence at all, it should do it by some other means such as fines or penalties awarded to the state[72] rather than by awarding windfall payments, unrelated to compensation, to a libel plaintiff. By dangling the carrot of huge windfall recovery, punitive damage awards encourage plaintiffs to file non-meritorious suits, which, even if defeated, require huge sums to defend.

SUMMARY

The ideal of "uninhibited, robust and wide open" discussion of public officials and issues of public importance can never be fully realized as long as the media responsible for providing the public outlet for such discussion is subject to the threat of large and unpredictable punitive damage awards. The specter of huge and increasingly unpredictable compensatory damage awards, along with the expensive litigation necessary to overcome passionate juries and errors of trial courts, is enough to provide a "chilling-effect" on the media without the additional burden of enormous punitive damage awards. Increasingly, juries are allowing awards that are aimed at bankrupting the defendant because he is unpopular or an advocate of the unorthodox. Libel litigation is not meant to cause undue self-censorship in the press, but rather to provide reasonable and adequate compensation to the plaintiff. Punitive damage awards are unpredictable and can be so potentially large that

they may destroy any hope a publisher may have had in the ideal of open discussion with some insulation from liability for defamation, especially when combined with the prospect of open-ended compensatory damage awards.

However, the pecuniary aspects of damage awards are only one side of the coin. When balancing the First Amendment against legitimate state interests in defamation cases, the state interest of punishment of the defendant and deterrence for any future defamation are of lesser importance when compared with the fundamental state interest of compensation for damages to reputation suffered by the plaintiff, vindication of which does not require punitive damages. The state's basic interest is to compensate for damages, not to punish or silence the press.

This is not to say that the press should not shoulder responsibility for its actions and answer in court for its conduct, or that full and fair compensation should not be made for damage to reputation. But, it has been shown that the press cannot contribute to full and open discussion of public affairs so long as the burden of punitive damage awards stimulate self-censorship. Therefore, punitive damages may not be the proper and legitimately constitutional remedy for defamation by the media. Anthony Lewis, New York Times columnist and Harvard Law School lecturer, espouses this concept at a recent symposium of libel scholars stating, "The vindication of one's good name does not require colossal verdicts. Damages awarded without effective limit in libel may violate the First Amendment."[73]

NOTES

1. New York Times, Co. v. Sullivan, 376 U.S. 254, 270, 84 Sup. Ct. 710, 11 L.Ed. 2d 686 (1964) (Hereafter referred to as Times).

2. "Decisions," 10 Med. L. Rptr. (13 March, 1984).

3. U.S., Constitution, amend. I, sec. 2.

4. Morris, "Punitive Damages in Tort Cases," 44 Harv. L. Rev. 1173 (1931), see also Restatement, second, Torts sec. 908.

5. Gertz v. Robert Welch, Inc. 418 U.S. 323, 350, 94 Sup. Ct. 2997, 41 L.Ed. 2d 789 (1974) (hereafter referred to as Gertz).

6. Morris, "Punitive Damages," pp. 1176-83.

7. Prosser, Handbook of the Law of Torts, sec. 2, p. 11 (4th ed. 1971).

8. Times p. 280, for an in-depth discussion by the Supreme Court on the elements of actual malice and its differences from the common law standard of malice, see St. Amant v. Thompson, 390 U.S. 727 (1968).

9. Gertz, p. 366.

10. Ibid., p. 350.

11. Ibid., p. 354 (Blackmun concurring).

12. Buckley v. Littell, 539 F. 2d 882 (2d Cir. 1976), Maheu v. Hughes Tool Co., 569 F. 2d 459 (9th Cir. 1978); Widener v. Pacific Gas & Electric Corp., 75 Cal. App. 3d 415, 142 Cal. Rptr. 304 (1977), cert. den., 436 U.S. 918 (1978); Diaz v. Oakland Tribune, 9 Med. L. Rptr. 1121, 1129 (Cal. App. 1983). As cited in McCory, "Development of Constitutional Privilege in Libel Law," in James C. Goodale (chairman) Communications Law 168 (New York: Practising Law Institute, 1981) pp. 178, 179.

13. "Exemplary Damages in the Law of Torts," 70 Harv. L. Rev. 517, 520 (1957) (a good history of punitive damages).

14. Curtis Publishing Co. v. Butts, 388 U.S. 130, 160 (1967).

15. Rosenbloom v. Metromedia, 403 U.S. 29, 91 Sup. Ct. 1811, 29 L.Ed. 2d 296 (1969) (hereafter referred to as Rosenbloom).

16. Ibid., p. 66 (Harlan dissenting).

17. Ibid., p. 86 (Marshall dissenting).

18. Ibid., p. 84-85.

19. Gertz, p. 341.

20. Ibid., p. 350.

21. Buckley v. Littell, 539 F. 2d 882, 897 (2d Cir. 1976).

22. Baggett v. Richardson, 473 F. 2d 863 (5th Cir. 1973), cited in Elser, Punitive Damages Review 1982.

23. Stone v. Essex County News Papers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975) see also M.G.L.A. c. 231 sec. 93, cited in Libel Resource Defense Center 50-State Survey 1982.

24. Miller v. Kingsley, 194 Neb. 123, 123, 230 N.W. 2d 472, 474 (1975) "The measure of recovery in all civil causes is compensation for the injury sustained," cited in Libel Resource Defense Center 50-State Survey 1982.

25. Standard v. Bolin, 88 Wash.2d 614, 565 P. 2d 94 (1977); Steele v. Johnson, 76 Wash.2d 750, 458 P.2d 889 (1969), Taskett v. KING Broadcasting, 86 Wash. 2d 439, 447, 546 P.2d 81, 86 (1976) "under no circumstances will we allow a jury to award punitive damages" (emphasis in original).

26. Baer v. Rosenblatt, 106 N.H. 26, 203 A.2d 773 (1964); Chagnon v. Union-Leader Co. 103 N.H. 426, 174 A.2d 825 (1961) punitive damages are not allowed as a separate measure of recovery in a tort action. Rather the plaintiff is entitled to an enhanced measure of recovery.

27. Wheeler v. Green, 286 Or. 99, 593 P.2d 777 (1979) the Oregon Constitution has been construed to prevent any award of punitive damages for defamation.

28. Stone v. Essex County News Papers Inc., 330 N.E. 2d 161, 169 (Mass. 1975).

29. Sprouse v. Clay Communications, Inc., 211 S.E.2d 674, 692 (W.Va. 1975).

30. See e.g. Goldwater v. Ginzberg, 414 F.2d 324 (2d Cir. 1969); Brewer v. Second Baptist Church, 32 Cal. 2d 791 (1948).

31. See e.g. Maheu v. Hughes Tool Co., 569 F.2d 459 (9th Cir. 1977); Appleyard v. Transamerica Press, Inc., 539 F.2d 1026 (4th Cir. 1976), cert. denied, 429 U.S. 1941 (1977) (as cited in a brief by Pepper, Hamilton, & Scheetz, for Green v. Larry Kane, 7948 Philadelphia County, 1982).

32. McCormick, Handbook on the Law of Damages sec. 85, 296 (1935).

33. Cabakov v. Thatcher, 117 A.2d 298, 303 (App. Div. 1955) (as cited in Pepper brief).

34. Bangert v. Hubbard, 126 N.E.2d 778, 782 (Ind. App. 1955) (f.n.s 34-43 cited in Pepper brief).

35. Stevenson v. Hearst Consolidated Publications, Inc., 214 F. 2d 902, 911 (2d Cir. 1954); Hustein v. Mileman Food Industries, Inc., 293 N.W. 2d 889, 892 (S.D. 1980).

36. Gray v. Allison Division, General Motors Corp. 370 N.E.2d 747, 754 (Ohio App. 1977).

37. Little v. Stuyvesant Life Insurance, Co., 136 Cal. Rptr. 653, 664(1977).

38. Moore v. Green, 431 F.2d 584 (9th Cir. 1970).

39. Motor Equipment Co. v. McLaughlin, 133 P.2d 149, 159 (Kan. 1943).

40. Faulk v. Aware Inc., 244 N.Y.S.2d 259, 266 (App. Div. 1963), aff'd. mem., 252 N.Y.S.2d 95, 200 N.E.2d 778 (N.Y. 1964), cert. denied, 380 U.S. 916 (1965).

41. Purcell v. Westinghouse Broadcasting Company, 411 Pa. 167, 187-88, 191 A.2d 662, 672 (1963).

42. Crowell-Collier Publishing Co., v. Caldwell, 170 F.2d 941, 944 (5th Cir. 1948).

43. Zarcone v. Perry, 572 F.2d 52, 55 n.6 (2nd Cir. 1978).

44. This information on damage awards has been collected from several sources including, the New York Times, Columbia Journalism Review and United Press International.

45. Rosenbloom, p. 84 (Marshall dissenting).

46. Gertz, p. 350.

47. See e.g., Afro-American Publishing Co. v. Jaffee, 336 F.2d 649, 662 (D.C. Cir. 1966); Maheu v. Hughes Tool Co., 384 F. Supp. 166, 170 (C.D.Cal. 1974) rev'd, 569 F.2d 459 (9th Cir. 1978); Airlie Foundation, Inc. v. Evening Star Newspaper Co., 337 F.Supp. 421, 431 (D.D.C. 1972) even compensatory damage awards must receive "particularly close scrutiny" to eliminate chilling effect (as cited in Pepper brief).

48. Anderson, "The Selective Impact of Libel Law," 14 Columbia Journalism Review 38-42 (May/June 1975).

49. Goldwater v. Ginzberg, 414 F.2d 324, 341 (2d Cir. 1969).

50. Times, p. 279.

51. Maheu v. Hughes Tool Co., 384 F.Supp. 166, 170 (Cal. 1974), (as cited in Pepper brief).

52. Times, p. 279.

53. United Press International wire service "Libel," 7 March 1984.

54. Hume, "The Mayor The Times and the Lawyers," 4[MORE] 17 (Aug. 1974), describing deletion of material from New York Times story on the basis of threatened defamation suit, a journalism review also declined to reprint the material (as cited in Pepper brief).

55. Franklin, "Suing Media for Libel: A Litigation Study," 3 Am.B.Found. Research J. 800 (Summer 1981).

56. UPI "Libel" 7 March 1984.

57. Anderson, "Libel and Press Self-Censorship," 53 Tex.L.Rev 422,435 (1975).

58. Maheu v. Hughes Tool Co., 384 F.Supp. 166, 170 (as cited in Pepper brief).

59. Franklin, "Winners and Losers and Why: A Study of Defamation Litigation," 3 Am.B.Found. Research J. 470, table 5 (Summer 1980).

60. Franklin (1980) p. 474 table 8.

61. Franklin (1980) p. 470.

62. Franklin (1980) p. 477 table 10.

63. Franklin (1981) p. 803 table 6.

64. Franklin (1980) p. 497-500.

65. Oakes, "Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma," 7 Hofstra L. Rev. 655, 711-12 (1979).

66. Times, p. 279.

67. Robertson, "Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc." 54 Tex L. Rev. 199, 260 (1976).

68. Schloerb and Chapin, "Punitive Damages; Touring the U.S. for Some Answers," Risk Management 29 (Dec. 1982), (an insurance industry magazine for risk managers).

69. Franklin (1981) p. 800.

70. Gertz, p. 340, 341.

71. Elrod v. Burns, 427 U.S. 64 (1964).

72. Garrison v. Louisiana, 379 U.S. 64 (1964).

73. "Of Reputations and Reporters," 123 Time 64 (March 19, 1984).